No. 11938.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Bo C. Roos and Frederick M. MacMurray, individually and as partners, trading and doing business as Beverly-Wilshire Enterprises,

Appellants.

vs.

Tighe E. Woods, Acting Housing Expediter, Office of the Housing Expediter,

Appellee.

BRIEF FOR APPELLANTS.

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Jurisdictional Statement.

This is an appeal by Bo C. Roos and Frederick M. MacMurray, defendants below, from a judgment of the District Court of the United States for the Southern District of California, Central Division, entered on the 20th day of February, 1948, awarding judgment to the plaintiff for the benefit of one Morgan Conway. The action was brought by the Housing Expediter pursuant to Section 205(e) and Section 205(c) of the Emergency Price Control Act of 1942, as amended, hereinafter called the Act (U. S. C. A., Title 50, App., Sec. 901 *et seq.*). Notice of appeal was filed by the defendants on April 16, 1948 [Tr. Vol. I, p. 80]. Jurisdiction of the District Court was invoked under Section 205(c) and 205(e) of the Act [Tr. Vol. I, p. 9], and of this Court under Section 128 of the Judicial Code (28 U. S. C. A. 225).

Statement of the Case.

The action, instituted by the Housing Expediter, sought (1) treble damages for certain alleged violations involving two tenants, one Langstaff and one Conway, both of whom occupied Apartment No. 609 during different periods of time, (2) a mandatory refund to said tenants of said alleged overcharges, and (3) an injunction prohibiting the defendants from violating the Act or regulations issued thereunder. The apartment house involved, which contains ninety-six rental units, was erected in 1913 [Tr. Vol. II, p. 45] and since that date had customarily been operated as an apartment hotel [Tr. Vol. II, p. 51]. In 1942, however, and until 1945, the Office of Price Administration only permitted the units in said building to be rented on a monthly basis. On February 27, 1945, the Price Administrator recognized daily rates for three of the units in the accommodations, including unit No. 609 [Tr. Vol. I, p. 72]. At this time said unit was occupied by a tenant at a monthly rate of rent. The first opportunity the defendants had to put the new daily rate into effect [Tr. Vol. II, p. 88] was when the said Langstaff and his wife moved into the accommodations on December 1, 1945 [Tr. Vol. II, p. 5]. When the said Langstaffs vacated said unit No. 609 on May 13, 1946, one Morgan Conway and his wife moved into said accommodations and remained there until June 5, 1947 [Tr. Vol. II, p. 14]. The complaint alleged that these two tenants were overcharged a total of some $984.00 during the periods of their occupancy [Tr. Vol. I, p. 12].

It was stipulated at the trial that only one question was in dispute, *i. e.,* whether said tenants Langstaff and Conway occupied unit No. 609 at a daily rate of rent or a monthly rate of rent [Tr. Vol. II, pp. 2, 9].

It was further stipulated [Tr. Vol. I, pp. 31-32] that the defendants had an approved O.P.A. rate of $6.00 per day for two persons when said unit was rented at a daily rate, and that said unit had a monthly rate of $100.50 for two persons when said unit was rented at a monthly rate, and that the said Langstaffs, during the period of their occupancy from December 1, 1945, until May 1, 1946, paid a total rental of $700.00, while the said Conways, during their period of occupancy from June 1, 1946, to March 1, 1947, paid a total rent of $1,620.00.[1]

Thus, if the said Langstaffs and Conways were occupying said unit at a daily rate, no overcharge occurred; if said persons occupied said accommodations at a monthly rate, an overcharge did occur. The District Court held that the Langstaffs, during their occupancy of said unit, were only entitled to a daily rate and that therefore no overcharge occurred as to them; that the Conways were only entitled to a daily rate from the 13th day of May, 1946, until June 1, 1946 (and that therefore no overcharge occurred during said period) but that from June 1, 1946, forward, the Conways were entitled to a monthly rate. Judgment was accordingly rendered against the defendants in the sum of $636.00. From this judgment defendants appeal.

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[1]This figure was changed slightly at the trial inasmuch as the testimony disclosed that the Conways actually moved into the accommodations on May 13, 1946, instead of June 1, 1946 [Tr. Vol. II, p. 14].

ARGUMENT.

I.

The Finding by the District Court That Morgan Conway Occupied Unit No. 609 at a Monthly Rate of Rent Was Clearly Erroneous.

Although the trial Court considered numerous irrelevant factors in arriving at its decision,[2] the actual issue before the Court was whether the oral contract entered into between Conway and the defendants specified a daily rate of rent or a monthly rate of rent.[3] The burden of proof was on the plaintiff to show that the said Conway was entitled to a monthly rate of rent by reason of the rental arrangements originally entered into between the parties.

The rental contract was made between Mrs. Blanche Bryson, the manager of the Bryson Apartments, and Morgan Conway himself. In addition, a conversation was held between Morgan Conway and one R. C. Palmer, the auditor for the apartment house. Mrs. Bryson testified, in unequivocal terms, that Mr. Conway inquired, prior to

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[2]The trial court indicated that the tenant Langstaff was only entitled to a daily rate as he was "more or less * * * a transient," while Conway occupied said unit for approximately one year [Tr. Vol. II, p. 86]; that the said Conway paid his rent once a month instead of each day [Tr. Vol. II, pp. 86-87]; that the person occupying unit No. 609 at the time OPA granted defendants permission to charge a daily rate was not immediately charged the higher rate [although it was stipulated by both counsel that the new rate could only be put into effect as regards a new tenant] [Tr. Vol. II, pp. 87-88]; that the defendants waited until the end of the tenancy to submit an additional bill [Tr. Vol. II, p. 90] although, actually, no "additional" bill was submitted; and that no daily rates were posted in the unit, thereby depriving the tenants of the knowledge that they were being charged at a daily rate [Tr. Vol. II, p. 91].

[3]It was stated by the District Court during the trial that "it seems to me the main consideration is what arrangements were made and what was said between them when he first went there" [Tr. Vol. II, p. 30].

renting said apartment, as to what rent would be charged and that she (Mrs. Bryson) replied that she "had nothing except on a daily rate, one apartment, and it was a daily rate of $6.00 a day * * *. He asked the rate and I said to him 'It is a daily rate.' It was very clear. 'I can only rent this to you on a daily rate.' He said it was satisfactory and we had no further conversation about its being not so" [Tr. Vol. II, pp. 50, 59]. Mr. Palmer, the auditor, testified that within a day or two after Conway moved into the accommodations Conway inquired of him regarding the manner in which his rent should be paid, and that he (Palmer) replied "Of course, you know it is $6.00 a day for the two * * * We can bill you any way you wish" and that it was thereupon agreed that he would send him a statement once each month [Tr. Vol. II, pp. 73-74].

Thus, if the decision of the lower court is to be sustained, it must be on the basis of the testimony given by Conway, as the testimony of both Mrs. Bryson and Mr. Palmer shows conclusively that the accommodations were let to Conway at a daily rate of rent and not at a monthly rate. But the findings are given no support by Conway's testimony which, at best, is vague and indefinite throughout. In response to an attempt by defendant's counsel to obtain Conway's version of the rental agreement, the following testimony was given [Tr. Vol. II, p. 24]:

> "Q. Was there anything stated regarding the rate you were to pay for the apartment? A. At that time, for the period, it was a partial month. It was around the 13th. And, until then, I paid $6.00 a day or $108.00 for the 18 days. That was the bill submitted to me.

Q. Did you understand you were renting an apartment at the rate of $6.00 per day? A. Why, frankly, no. I expected to stay on there and live there.

Q. Did you understand that the rate for the apartment was $6.00 per day? A. Well, I was given a bill for $108 and I would say that is $6.00 a day.

Q. Did you have any discussion, prior to the time you were given a bill, about what the rate would be? A. Yes. At that time I talked with Mrs. Bryson or Mr. Palmer.

Q. Didn't she tell you at that time the rate was $6.00 a day for that apartment? A. Well, it must have been $6.00. I mean I was given a bill for $108 and 18 days and I paid it. So it must be. All I know is at the start of the month I got a bill for $180."

Counsel continued to demand a definite answer regarding the $6.00 a day rate [Tr. Vol. II, p. 26]:

"Q. Do I understand that you did have a conversation with Mrs. Bryson prior to the time you moved in, or contemporaneously therewith, wherein she told you the rate for this month was $6.00 per day?

Mr. Solof: That is what the witness testified to.

* * * * * * * *

A. It must have been on that basis until the end of the month. We had lived at the Beverly-Wilshire and we were put out after five days, and we understood, when we moved there, we would be permanent guests. And you couldn't stay in a place after five days, in a hotel.

Q. By Mr. Bent: Do you recall whether that was told you or not? A. What was told to me, sir?

Q. That the rate was $6.00 per day for you and your wife. A. It would be at least on that basis up until the end of the month, which is evidenced by the bill that was submitted to me for $108.

Q. Do you recall that that was told to you? Is your answer yes or no to that? A. It must have been that. It had to be that."

Mr. Conway further testified that he had no further conversation regarding the payment of rent or the rate he was to pay but that "a bill came in at the first of the month for $180 and I paid it. I had no reason to have any further conversation" [Tr. Vol. II, p. 27].

The District Court itself finally took over the witness Conway [Tr. Vol. II, pp. 34-35:

"The Court: What inquiry did you make, if any about the rent? What did you ask or what was said? A. Whether I asked or whether Mrs. Bryson voluntarily told me what the rental was, I don't recall. In other words, I don't know whether I asked, 'What is the rent?' or she said 'The rent will be $6.00 a day until the end of the month, and then we will submit a bill to you on the 1st of each month.'

The Court: Then, there was a statement by somebody, or by Mrs. Bryson, that the rent would be $6.00 a day until the end of the month and thereafter a bill would be submitted? A. That is right.

The Court: And that is all there was? A. Of $180 a month.

The Court: That a bill would be submitted to you at the rate of $180 a month? A. Yes, sir."

The Court continued to press for the actual conversation and the witness Conway then repudiated his former statements [Tr. Vol. II, pp. 35-36]:

> "The Court: You were to pay $180 a month after the 1st of the month, in advance, is that correct, and the bill would be submitted to you? Is that correct? A. Well, maybe, after I got the first bill for $108, I naturally assumed they would send me a bill for 180. They submitted a bill to me, two days after, for the $108 and I paid it, and thereafter a bill was submitted for $180 a month.
>
> The Court: And you paid it? A. Yes.
>
> The Court: And you continued to pay it? A. I continued to pay it. * * *"

The lower court specifically held that Conway entered into a rental agreement to pay $6.00 a day for the accommodations, at least until the first day of June, 1946, as conclusion of law No. 2 specifically so states [Tr. Vol. I, pp. 46-47]. Conway's statement, quoted above, that he was advised he would be "billed" once a month certainly could not change this definite agreement relating to the "rate" he was to be charged. To argue that the frequency the rent was paid overrode a definite agreement as to the rate of rent would be to argue that the Judges of this Court, because they receive their salaries once each month, are on monthly tenure. However, Conway later stated that he had perhaps only "assumed" that he had been told a monthly bill would be sent him [Tr. Vol. II, p. 36].

Appellants submit that in view of the above, the lower court's decision is not only clearly erroneous in holding that the tenant Conway occupied the accommodations un-

der an agreement providing for a monthly rate of rent,[4] but that said decision is totally unsupported by any substantial evidence. In fact, no permissible inferences in support of the Court's decision can be drawn from any portion of the record below. Counsel for plaintiff made much of the fact that the statements rendered Conway called for $180.00 each month regardless of the fact that some months contained thirty days while others contained thirty-one [Tr. Vol. II, pp. 76-78]. However, the uncontradicted testimony was that it is the customary practice in hotel and apartment house operations to consider every month as containing thirty days [Tr. Vol. II, pp. 57-59].

The maximum rent for unit No. 609 as a partially furnished unit without services was in the sum of $100.50 [Tr. Vol. I, p. 74]. The actual effect of the Court's order was to permit Conway to occupy this unit as a fully furnished unit with daily services given for $100.50 in direct violation of the rental agreement.

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[4]Although there is no substantial evidence to support the lower court's findings, it is clear that appellants need not argue this far in view of recent decisions interpreting Rule 52(a) of the Federal Rules of Civil Procedure, which rule adopts the equity practice of review in situations of this type as it existed prior to the passage of the Federal Rules in 1938. See *Dumas v. King* (C. C. A. 8th, 1946), 157 F. (2d) 463; *Union Producing Co. v. White* (C. C. A. 5th, 1946), 157 F. (2d) 254; *Bradburn v. McIntosh* (C. C. A. 10th, 1947), 159 F. (2d) 925; *Mycalex Corp. of America v. Pemco Corp.* (C. C. A. 4th, 1947), 159 F. (2d) 907; *Campbell v. Mueller* (C. C. A. 6th, 1947), 159 F. (2d) 803; *White v. Bruce Co.* (C. C. A. 3d 1947), 163 F. (2d) 304; *General Metals Powder Co. v. S. K. Ullman Co.* (C. C. A. 6th, 1946), 157 F. (2d) 505; *Davis v. Johnson* (C. C. A. 9th, 1946), 157 F. (2d) 264.

Conclusion.

Appellants submit that for the reasons stated herein, the findings of the District Court are clearly erroneous and the judgment should be reversed.

Dated this 3rd day of September, 1948.

Respectfully submitted,

HERBERT H. BENT,

Attorney for Appellants.